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MD ISA BUJANG v. PL SOON HUAT REALTY SHD BHD & ORS

HIGH COURT MALAYA, ALOR SETAR
MAHAZAN MAT TAIB J
[ORIGINATING SUMMONS NO: KA-24NCvC-75-03-2022]
30 APRIL 2024

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Abstract – *A land which has been duly declared and gazetted under the provisions of the State Enactment concerning Malay reservation, would only lose its status of Malay reservation when it is duly revoked under the provisions thereof. There is nothing in art. 89 of the Federal Constitution that suggests that the failure to declare a replacement land of similar character to the revoked Malay reserve land, would render the revocation of the Malay reservation of land void.*

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LAND LAW: *Malay reservations – Revocation of Malay reserve land – Land in State of Kedah – Procedure to revoke status of Malay reservation – Whether revocation properly done under s. 4(b) of Enactment No. 63 (Malay Reservations) (Kedah) – Whether requirement for express revocation to be gazetted fulfilled – Whether declaration of replacement land intended to replace revocation of Malay reserve land – Whether failure to declare replacement land of similar character rendered revocation of Malay reservation land void*

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Originally, the land was a Malay reserved land ('land') pursuant to *Gazette* No. 1180 dated 4 April 1933 with the express condition of 'Lain-lain Jenis Tanaman', which declared Mukim Kedawang and Mukim Padang Matsirat as Malay reservation. However, the plaintiff contended that the express condition of 'Lain-lain Jenis Tanaman' was purposely crossed out with pen and replaced with 'Kediaman – Pangsapuri' without any application. This was denied by the Land Administrator ('third defendant') who contended that there was an application to change the category of land use made by Darus bin Hanapi ('Darus') based upon a power of attorney created by the plaintiff, which the plaintiff denied. The plaintiff stated that the Ruler in Council in *Gazette* No. 124 revoked the status of Malay reservation of the land and swapped with another land, Lot 558 as declared Malay reservation in *Gazette* No. 127. The plaintiff, however, further raised that the swapping did not take place as the proprietor of Lot 558 was Ng Chin Keong who received the title from Ooi Boon Lai on 17 January 2011. The land was charged by the plaintiff to CIMB Bank Bhd ('CIMB') to secure amounts under several banking facilities granted by CIMB to PMK-Moccis Resorts (M) Sdn Bhd ('PMK'). When the plaintiff and PMK defaulted in repayment of the banking facilities, CIMB proceeded with the foreclosure of the plaintiff's land and two other lots belonging to Darus. The first defendant

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purchased the two lots and the land *via* public auction and created charge over the land in favour of Malayan Banking Bhd ('second defendant') who granted banking facilities to part-finance the purchase of the land and accepted the land as security, on the basis that it was a freehold non-Malay reserve land. Certificate of sale by Land Administrator in Form 16I was issued by the third defendant and the title of the land was transferred to the first defendant, who was registered as a non-Malay proprietor. The plaintiff's subsequent suit against CIMB, on the allegation of delay in the auction process and for damages, was struck out by the High Court and that decision was affirmed by the Court of Appeal. In this originating summons ('OS'), the plaintiff, *inter alia*, sought the declarations that: (i) the *Gazette* Nos 124 and 127 were illegal, null and void *ab initio*; (ii) the land was at all material times and still a Malay reserve land; (iii) the public auction and certificate of sale by the third defendant and the transfer of the land to the first defendant was illegal, null and void *ab initio*; (iv) all charges registered on the land in favour of the second defendant were illegal, null and void *ab initio*; and (v) the plaintiff was still the owner of the land. The main issue for determination was whether the land was a Malay reserve land.

Held (dismissing application):

(1) The procedure to revoke the status of Malay reservation over the land *via Gazette* No 124 was properly done under the then s. 4(b) of the Enactment No. 63 (Malay Reservations) (Kedah) ('Enactment'). The then s. 4(b) of the Enactment required an express revocation to be gazetted so as to be effective, and which is also the only way for a Malay reserved land to lose its character. Further, a careful reading of art. 89(3) of the Federal Constitution does not suggest that failure to declare a replacement land of a similar character would render the revocation of the Malay reservation of any land void. Instead, it merely mandates that in the case when the Malay reservation of any land is revoked, the Government of the State shall, in accordance with their Malay Reservation Enactment, declare as Malay reservation any land of similar character and of an area not exceeding the area of that land. (paras 34, 35 & 39)

(2) The declaration as Malay reservation of Lot 558 *via Gazette* No. 127 was not intended to serve as the replacement land for the revocation of the Malay reservation of the land. Therefore, the issue regarding the failure of the swapping to take place, as the proprietor of Lot 558 was Ng Chin Keong who received the title from Ooi Boon Lai on 17 January 2011, did not affect the validity of the revocation of the Malay reservation of the land. As a consequence, the OS shall be dismissed. The land was no longer a Malay reserve land. (paras 42 & 43)

(3) The second defendant's argument on estoppel under s. 115 of the Evidence Act 1950 would be untenable as the present action was by way of OS, where evidence is adduced by way of affidavits in accordance with O. 28 r. 3C of the ROC. The Evidence Act 1950 did not apply to affidavits in the present case. Further, the doctrine of approbate and reprobate being an equitable rule was not applicable to the present context involving Malay reservations, upon the following reasons: (i) the Enactment and the Malay Reservations Enactment 1930 (Kedah) (Enactment 29) were made with a definite object, which shall not be defeated through the application of equitable rules; and (ii) the doctrine of approbate and reprobate was in the first place confined to cases arising under wills, deeds and other instruments *inter vivos*, and if it was applied, it would be extended to situations beyond the original or earlier situations, which even leads to greater injustice. (paras 44, 47 & 53)

(4) The plaintiff's action was not time-barred as the clear and unequivocal threat to the plaintiff's right to the land only happened on 10 February 2022 against the first defendant and 28 April 2022 against the second defendant. Even though the plaintiff's action was not time-barred and the doctrine of approbate, and reprobate was not applicable, the OS should be dismissed upon the grounds that the land was no longer a Malay reserved land. (paras 59 & 60)

Case(s) referred to:

Express Newspapers Plc v. News (UK) Ltd And Others [1990] 1 WLR 1320 ***(refd)***
Lissenden v. CAV Bosch Ltd [1940] AC 412 ***(refd)***
Merdeka University Bhd v. Government Of Malaysia [1981] CLJ 175; [1981] CLJ (Rep) 191 HC ***(refd)***
Meridian Asset Management Sdn Bhd v. Ong Kheng Hoe & Ors [2010] 7 CLJ 1 FC ***(refd)***
Mohamed Isa & Ors v. Abdul Karim & Ors [1970] CLJU 82; [1970] 1 LNS 82 HC ***(refd)***
Nasri v. Mesah [1970] CLJU 85; [1970] 1 LNS 85 FC ***(refd)***
Nor Azahar Zainol v. Pentadbir Tanah Langkawi & Ors [2017] 5 CLJ 629 HC ***(refd)***
PB Securities Sdn Bhd v. Autoways Holdings Bhd [2000] 4 CLJ 811 CA ***(refd)***
Robert Lee & Anor v. Wong Ah Yap & Anor [2007] 4 CLJ 1 FC ***(refd)***
Tan Swee Lan v. Engku Nik Engku Muda & Ors [1973] CLJU 156; [1973] 1 LNS 156 FC ***(refd)***
Zaleha Sahri v. Pendaftar Hakmilik Tanah Johor [1996] 2 CLJ 147 HC ***(refd)***

Legislation referred to:

Enactment No. 63 (Malay Reservations) (Kedah), ss. 3, 4(b)
Evidence Act 1950, ss. 2, 115
Federal Constitution, art. 89(1), (3), (4)
Limitation Act 1953, s. 9(1)
Malay Reservations Enactment 1913, s. 4(i)(b)
Malay Reservations Enactment 1930 (Kedah) (Enactment 29), ss. 2, 3, 4(1)(b)
Rules of Court 2012, O. 28 r. 3C

Other source(s) referred to:
Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia: Cases And Commentary*, 3rd edn, LexisNexis, 2012, p 1035

For the plaintiff - Gurbachan Singh & Gurmit Singh; M/s Gurmit & Co
For the 1st defendant - Quah Boon Nee, Mohd Farid Azahari & Yasmin Maisarah Mohd Amin; M/s JB Lim & Assocs
For the 2nd defendant - Claudia Cheah Pek Yee & Aufa Radzi; M/s Skrine
For the 3rd & 4th defendants - Nurul Liyana Mohammad Nasir; State Legal Advisors, Kedah

Reported by S Barathi

JUDGMENT

Mahazan Mat Taib J:

Introduction

[1] This is an originating summons in encl. 1 filed by the plaintiff claiming for, *inter alia*, the following reliefs:

(i) a declaration that the Kedah Government Gazette No. 124 and 127 dated 9 March 1998 are illegal, null and *void ab initio*;

(ii) a declaration that the land, Geran Mukim No. GM 1375, No. Lot 2500, Bandar Padang Mat Sirat, Tempat Tanjung Mali, Langkawi, Kedah (previously known as H.S. (M) 33-85, Plot 14, PT 281, Mukim Kedawang, Tempat Tanjung Mali, Langkawi, Kedah) ("the land") is at all material times and still a Malay Reserve Land pursuant to *Gazette* No. 1180 dated 4 April 1933 and s. 2 of the Malay Reserve Enactment 1930;

(iii) a declaration that the public auction dated 6 July 2011 and the certificate of sale by the Land Administrator dated 6 December 2011 and the transfer of the land to the first defendant are illegal, null and *void ab initio*;

(iv) a declaration that all the charges registered on the land by the first defendant in favour of the second defendant are illegal, null and *void ab initio*;

(v) a declaration that the plaintiff is still the owner of the land;

(vi) the third defendant to immediately cancel the two endorsements on the original title, *ie*, the registration of the transfer of the land to the first defendant and the registration of the charges to the second defendant, and to re-enter the endorsement of Malay Reserve on the original title and all the records in the land office in Langkawi;

A (vii) the third defendant to immediately register in the original title the plaintiff's name as the owner of the land or alternatively the third defendant to issue a new title with the endorsement of Malay Reserve with the plaintiff's name as the owner of the land; and

B (viii) an order that the original title of the land and all documents related to the land including the duplicate charges held by the first defendant and/or the second defendant or any parties to be immediately handed to the third defendant to give effect to prayers (ii), (iii), (iv) and (v) above.

C **[2]** For ease of reference, the parties in this case will be referred to as follows:

(i) Md Isa bin Bujang; - plaintiff

(ii) PL Soon Huat Realty Sdn Bhd; - first defendant

D (iii) Malayan Banking Berhad; - second defendant

(iv) Pentadbir Tanah Langkawi; and - third defendant

(v) Kerajaan Negeri Kedah Darul Aman - fourth defendant

Background Facts

E **[3]** Originally, the land was known as HS (M) 33-85, Plot 14, PT 281, Mukim Kedawang, Tempat Tanjung Mali, Langkawi, Kedah; it was a Malay Reserved Land pursuant to *Gazette* No. 1180 date 4 April 1933 with the express condition of "lain-lain jenis tanaman", which declared Mukim Kedawang and Mukim Padang Mat Sirat as Malay reservation.

F **[4]** However, the plaintiff contended that the express condition of "lain-lain jenis tanaman" was purposely crossed out with pen and replaced with "kediaman – pangsapuri" without any application. On the other hand, the third defendant denied the foregoing, and contended that there was an application of the change of category of land use made by Darus bin Hanapi G based upon a power of attorney dated 6 March 1993 created by the plaintiff. In reply, the plaintiff denied and argued that the power of attorney was meant to obtain approval for partition and amalgamation of the land including application of certificate of fitness for occupation and the sale of houses which are partitioned, and not for replacement and revocation of Malay H reservation.

[5] Subsequently, the original land title was replaced by a computer printed issue document of title registered on 26 October 1985 and the condition of Malay reserved land was not stated therein. There were several replacements and changes of title for the land, which was Geran Mukim I 1999, No. Lot 2500 was registered on 6 March 2002. Subsequently, it was replaced by Geran Mukim 1375, Lot 2500 registered on 29 June 2005, which is the current title of the land.

[6] On 14 May 1996, Darus bin Hanapi filed application to revoke Malay reservation from the land based upon a power of attorney dated 6 March 1993 created by the plaintiff, and the plaintiff also made the same application on 1 January 1997. However, the plaintiff denied and contended that he did not make such application as the details in the attachment therein regarding him as the owner of GM 262, Lot 558, in Mukim Kubang Pasu, Daerah Kubang Pasu ("Lot 558") was not true, and that such attachment was not signed by him.

[7] Pursuant to *Gazette* No. 124 dated 9 March 1998, the Ruler in Council had revoked the declaration of Malay reservation for the land. Furthermore, pursuant to *Gazette* No. 127, the Ruler in Council had also declared Lot 558 as land on the Malay reservation. Subsequently, the revocation of the land as a Malay reservation was endorsed on 13 August 1998.

[8] The plaintiff *via* affidavit in support stated that the Ruler in Council in *Gazette* No. 124 revoked the status of Malay reservation of the land and swapped with another land which is Lot 558 as declared Malay reservation in *Gazette* No. 127. However, the plaintiff further raised that the swapping did not take place as the proprietor of Lot 558 was Ng Chin Keong who received the title from Ooi Boon Lai on 17 January 2011. Notably, the third and fourth defendants admitted the foregoing statements made.

[9] Apart from that, there are another two lands, known as Geran Mukim No. 599, Lot 2605, Mukim Kedawang, Tempat Tanjung Mali, Daerah Langkawi, Kedah ("Lot 2605") and Geran Mukim 1389, Lot 2606 Bandar Padang Matsirat, Tempat Tanjung Mali, Daerah Langkawi,Kedah (currently known as HS(M) 1015, PT 602, Bandar Padang Mat Sirat, Tempat Tanjung Mali, Daerah Langkawi, Kedah) ("Lot 2606").

[10] The plaintiff charged the land to CIMB Bank Berhad ("CIMB") to secure amounts under several banking facilities granted by CIMB to PMK-Moccis Resorts (M) Sdn Bhd ("PMK"). Moreover, Lot 2605 and Lot 2606 belonged to Darus bin Hanapi, and were charged to CIMB to secure the banking facilities.

[11] However, the plaintiff and PMK defaulted in repayment of the banking facilities, and subsequently, CIMB proceeded with the foreclosure of Lot 2605, Lot 2606 and the land. Moreover, the plaintiff requested for the land to be revalued to fix the reserve price at the next auction. Thereafter, the reserve price was fixed at RM33,750,000 based upon a valuation report dated 14 November 2009 submitted by the plaintiff.

[12] There are three auctions held in total, and the land was sold at the third auction; the first auction was held on 3 February 1999, the second auction was held on 24 June 2008, and the third auction was held on 6 July 2011.

[13] On 6 July 2011, the first defendant had purchased Lot 2605, Lot 2606 and the land *via* public auction held by the third defendant for the total amount of RM37,050,000. The first defendant created charge over the land in favour of the second defendant who granted banking facilities to part-finance the purchase of the land and accepted the land as security on the basis that it is a freehold non-Malay reserved land.

[14] Certificate of sale by Land Administrator in Form 16I dated 6 December 2011 was issued by the third defendant and transferred the title of the land to the first defendant and also registered the first defendant as a non-Malay proprietor. Moreover, the first defendant was not listed as an entity to own or be vested any benefit or right including receiving or holding charge in respect of a land of Malay reservation in Kedah under the *Gazette* KPU 1 dated 12 January 2017, and the first defendant was also a non-Malay entity pursuant to a search of Suruhanjaya Syarikat Malaysia ("SSM") by the plaintiff.

[15] In 2017, the plaintiff commenced a suit against CIMB in the High Court of Alor Setar ("CIMB suit") alleging that there was a delay in the auction process, and thus he sought substantial damages being the purported loss suffered due to the delay. On 18 June 2018, the High Court struck out the suit, *inter alia*, upon the ground that the plaintiff failed to obtain prior sanction of the official assignee to commence the suit, and that the delay was not occasioned by CIMB's neglect. Subsequently, on 18 January 2021, the Court of Appeal affirmed the decision of the High Court.

[16] The plaintiff stated that he never made any application for the land to be replaced with another land as Malay reservation, and complained the same to his brother, Nor Azahar bin Zainol, who then lodged a police report on 17 November 2021. Furthermore, the plaintiff's child also made a police report on 15 November 2021, and wrote a letter to the authority for investigation and application for Registrar Caveat over the land. On 6 January 2022, the Registrar Caveat was entered over the land.

[17] On 10 February 2022 and 14 February 2022, the plaintiff sent notice *via* his solicitors to the first and second defendants respectively for the claim of the grant of the original title of the land and the building plans on the land together with vacant possession, as well as for the cancellation of the respective charges, upon the basis that the swapping failed to take place and therefore the land remains as Malay reservation; and that the revocation of the Malay reservation by the fourth defendant, the purchase of the land *via* public auction on 6 July 2011 by the first defendant and the registration of the first defendant as the proprietor of the land *via* Form 16I dated 6 December 2011 are void.

[18] The first defendant's solicitors replied to the plaintiff *via* a letter dated 10 February 2022 that the first defendant had no actual or constructive knowledge of the allegations made, and thus the plaintiff's notice did not merit their reply.

[19] On the other hand, the second defendant had in the affidavit in reply, encl. 9 dated 28 April 2022, stated that such affidavit shall serve as a reply to the plaintiff's notice of demand, which also prayed for the plaintiff's originating summons to be dismissed.

Legal Issues

[20] Premised upon all the affidavits and submissions of the parties, the court agreed with the first defendant that the main issue to be decided is whether the land is a Malay reserved land; and once this is determined, the declarations and reliefs sought by the plaintiff will be decided accordingly.

[21] However, the court is of the considered view that there are another two important issues to be determined and discussed, and thus the pertinent legal issues for determination are as follows:

(i) whether the land is a Malay reserved land;

(ii) whether the plaintiff is estopped from filing this suit; and

(iii) whether a limitation period has set in.

Analysis And Findings

First Issue – Whether The Land Is A Malay Reserved Land

[22] The plaintiff submitted that pursuant to *Gazette* No. 1180 dated 4 April 1933 the land is still a Malay Reserved Land due to the reason that *Gazette* No. 124 and *Gazette* No. 127 dated 23 April 1998 are void when the swapping did not take place as the proprietor of Lot 558 was Ng Chin Keong who received the title from Ooi Boon Lai on 17 January 2011.

[23] Therefore, it is of paramount importance to first determine the procedure of revocation, and secondly whether the revocation of the land as a Malay reservation is void when the swapping failed to take place.

Procedure Of Revocation

[24] First and foremost, the guarantee of Malay reservation has constitutional standing as provided under art. 89 of the Federal Constitution as follows:

> Malay reservations
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> 89. (1) Any land in a State which immediately before Merdeka Day was a Malay reservation in accordance with the existing law may continue as a Malay reservation in accordance with that law until otherwise provided by an Enactment of the Legislature of that State, being an Enactment:

A (a) passed by a majority of the total number of members of the Legislative Assembly and by the votes of not less than two-thirds of the members present and voting; and

(b) approved by resolution of each House of Parliament passed by a majority of the total number of members of that House and by the votes of not less than two-thirds of the members voting.

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(1A) Any law made under Clause (1) providing for the forfeiture or reversal to the State Authority, or for the deprivation, of the ownership of any Malay reservation, or of any right or interest therein, on account of any person, or any corporation, company or other body (whether corporate or unincorporate) holding the same ceasing to be qualified or competent under the relevant law relating to Malay reservations to hold the same, shall not be invalid on the ground of inconsistency with Article 13.

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(2) Any land in a State which is not for the time being a Malay reservation in accordance with the existing law and has not been developed or cultivated may be declared as a Malay reservation in accordance with that law:

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Provided that:

(a) where any land in a State is declared a Malay reservation under this Clause, an equal area of land in that State which has not been developed or cultivated shall be made available for general alienation; and

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(b) the total area of land in a State for the time being declared as a Malay reservation under this Clause shall not at any time exceed the total area of land in that State which has been made available for general alienation in pursuance of paragraph (a).

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(3) Subject to Clause (4), the Government of any State may, in accordance with the existing law, declare as a Malay reservation:

(a) any land acquired by that Government by agreement for that purpose;

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(b) on the application of the proprietor, and with the consent of every person having a right or interest therein, any other land,

and shall, in accordance with the existing law, immediately declare as a Malay reservation, in a case where any land ceases to be a Malay reservation, any other land of a similar character and of an area not exceeding the area of that land.

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(4) Nothing in this Article shall authorize the declaration as a Malay reservation of any land which at the time of the declaration is owned or occupied by a person who is not a Malay or in or over which such a person has then any right or interest.

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(5) Without prejudice to Clause (3), the Government of any State may, in accordance with law, acquire land for the settlement of Malays or other communities, and establish trusts for that purpose.

(6) In this Article "*Malay reservation*" means land reserved for alienation to Malays or to natives of the State in which it lies; and "Malay" includes any person who, under the law of the State in which he is resident, is treated as a Malay for the purposes of the reservation of land.

(7) Subject to Article 161A, this Article shall have effect notwithstanding any other provision of this Constitution; but (without prejudice to any such other provision) no land shall be retained or declared as a Malay reservation except as provided by this Article and Article 90.

(8) The provisions of this Article shall apply to the Federal Territories of Kuala Lumpur and Putrajaya in the like manner that they apply to a State, save that Clause (1) in its application to the Federal Territories of Kuala Lumpur and Putrajaya shall be modified to read that any land in the Federal Territory of Kuala Lumpur or the Federal Territory of Putrajaya which immediately before Merdeka Day was a Malay reservation in accordance with the existing law may continue as a Malay reservation in accordance with that law until otherwise provided by an Act of Parliament passed by a majority of the total number of members of each House of Parliament and by the votes of not less than two-thirds of the members present and voting in each House.

[25] In the State of Kedah, the statute regulating the Malay reservation is the Malay Reservations Enactment 1930 (Revised 2019) ("MRE 1930"), where ss. 3 and 4 thereof provide for the declaration and revocation of Malay reservation respectively as follows:

Declaration of Malay reservation

3. (1) It shall be lawful for the Ruler in Council to declare by notification in the *Gazette* any area of land to be a Malay reservation.

Provided that no land shall be declared to be in any Malay reservation which, at the time of coming into force of this Enactment, is included in any area declared to be a Sanitary Board area in accordance with the provisions of s. 3 of Enactment No. 106 (Sanitary Boards) or is included in any area declared to be a town under s. 11 of National Land Code.

(2) Such declaration shall describe the limits and boundaries of such area by one or more of the following means:

(a) by reference to a Mukim or District;

(b) by reference to the boundaries of surveyed or demarcated lands;

(c) by reference to natural features; or

(d) otherwise as to the Menteri Besar seems expedient,

but it shall not be necessary for the purposes of such declaration to survey the area therein referred to.

(3) Such declaration shall take effect on the publication thereof in the *Gazette*.

A Alteration and revocation of Malay reservation

4. (1) The Ruler in Council may at any time either at its own instance or upon the application of any person by declaration in the *Gazette*:

(a) alter the limits or boundaries of any Malay reservation;

B (b) revoke any declaration under s. 3, either as to the whole or any part of the area therein referred to; or

(c) include in any Malay reservation any land excluded therefrom.

(2) Such declaration shall take effect on publication thereof in the *Gazette*.

C **[26]** In the present case, the status of the Malay reservation of the land was revoked under the then s. 4(b) of the Kedah Enactment No. 63 (Malay Reservations), where the then ss. 3 and 4 are reproduced as follows:

Section 3:

(1) It shall be lawful for the Ruler-in-Council to declare by notification in
D the *Gazette* any area of land to be a Malay Reservation.

Provided that no land shall be declared to be in any Malay Reservation which, at the time of coming into force of this Enactment, is included in any area declared to be a Sanitary Board area in accordance with the provisions of s. 3 of Enactment No. 106 (Sanitary Boards) or is included
E in any area declared to be a town under S. 5 of Enactment No. 56 (Land).

(2) Such declaration shall describe the limits and boundaries of such area by one or more of the following means:

(a) by reference to a Mukim or District, or

F (b) by reference to the boundaries of surveyed or demarcated lands, or

(c) by reference to natural features, or

(d) otherwise as to the Ruler-in-Council seem expedient,

but it shall not be necessary for the purposes of such declaration to survey the area therein referred to.
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(3) Such declaration shall take effect on the publication thereof in the *Gazette*.

Section 4:

The Ruler-in-Council may at any time either at its own instance or upon
H the application of any person by declaration in the *Gazette*:

(a) alter the limits or boundaries of any Malay Reservation, or

(b) revoke any declaration under s. 3, either as to the whole or any part of the area therein referred to, or

I (c) include in any Malay Reservation any land excluded therefrom.

Such declaration shall take effect on publication thereof in the *Gazette*.

[27] In *Principles of Malaysian Land Law*, 2nd edn, (LexisNexis, 2022), the authors provided some insightful explanations regarding the constitutional protection for Malay reservation as follows:

> [11-28] Articles 89 and 90 of the Federal Constitution are the legacy of the historical past. The justification for enshrining these salient features in the Federal Constitution was that the Malays, despite being in a majority, are historically a disadvantaged race. Provisions were created to preserve the Malay race as permanent Malay peasants and for the preservation of land for the future Malay generation. It is a trust property. The institution of Malay reservation has become a permanent feature of Malaysia's geo-politics'. *Malay reservation law can be classified as the 'entrenched laws protected by the Federal Constitution'. Article 89 of the Federal Constitution comprehensively underlines the constitutional foundation of Malay reservation policy*, whilst Article 90 lays the foundation for Malay holding. Even though Malay reservation land is under the State list, yet the Federal Government was given wide and unlimited jurisdiction to control and oversee the implementation of the Malay Reservation Enactment. The Reid Report was of the opinion that in order to facilitate schemes for national interest development and for the need of uniformity of land system, it was advisable that the Federation should have the powers to monitor or carry out these schemes.
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> (emphasis added)

[28] In the case of *Mohamed Isa & Ors v. Abdul Karim & Ors* [1970] CLJU 82; [1970] 1 LNS 82; [1970] 2 MLJ 165, one of the issues arose as to whether the land remained in the Malay reservation after the land became State land, as could be seen in the following passages together with the decision by Raja Azlan Shah J (as His Royal Highness then was):

> ... Section 2 of the Enactment defines Malay Reservation as one duly declared and gazetted under the provisions of the Enactment or of the Malay Reservations Enactment, 1913. It is not disputed that the said land was so gazetted in the *Gazette* notification of 8th September 1921 made under the provisions of the Malay Reservations Enactment, 1913. *Where such land has been so declared to be in Malay Reservation it will lose its character only when it is duly revoked under the provisions of s. 4(i)(b) which states*:
>
> > The Menteri Besar may at any time, with the approval of the Ruler of the State in Council by declaration published in the *Gazette* revoke any declaration whereby any land has been declared to be Malay Reservation, either as to the whole or any part of the area therein referred to.
>
> *I think s. 4(i)(b) clearly contemplates that there need to be an express and not implied revocation, and such revocation has to be gazetted so as to be effective*. There is no such *Gazette* notification declaring that it has been so revoked. To hold that an agricultural land in Malay Reservation when converted into mining land loses its character as a Malay Reservation land would, I think, be contrary to the intention of the Enactment which aims at preserving

A and protecting Malay interests. The preamble in the Enactment states that it is an Enactment to amend and consolidate the law relating to Malay Reservation and to provide for securing to Malays their interests in land.

The Enactment provides only one way by which a Malay Reservation land may lose its character – ie, by revocation under the provisions of s. 4(i)(b). To hold
B *otherwise than is contemplated by the Enactment would certainly defeat the whole purpose of the Enactment*. Furthermore, under s. 5 of the Enactment, any State land may be included in a Malay Reservation. Though the provisions of s. 6(ii) had not been observed when the mining lease was issued, it would not, I think, take the said land out of Malay Reservation because there is nowhere in the Enactment which states that the non-
C observance of the provisions of s. 6(ii) would have the effect of losing its character as Malay Reservation land. The section merely requires the collector of the district in which such land is situated to present to the proper registering authority a requisition in the proper form requiring him to note in his register of title the fact of the inclusion of such land in such Malay Reservation. This, I think, is merely an executive act and has no
D legal effect on the character of the land. In the circumstances, I think it would certainly be within the spirit and intendment of the Enactment that the said land unless so revoked under the provisions of s. 4(i)(b) still retains its character as Malay Reservation land.

(emphasis added)

E **[29]** In the case above, Raja Azlan Shah J (as His Royal Highness then was) held that the land duly declared and gazetted under the provisions of the Malay Reservations Enactment 1913 would only lose its character of Malay reservation when it was duly revoked under s. 4(i)(b) of the same which required an express revocation to be gazetted so as to be effective, and which
F is also the only one way for a Malay Reserved Land to lose its character.

[30] In the case of *Zaleha Sahri v. Pendaftar Hakmilik Tanah Johor* [1996] 2 CLJ 147; [1996] MLJU 1, the High Court decided that when the land was declared to be in Malay reservation under the Malay Reservations Enactment 1936, the only way to lose such character is by revocation under
G the provision therein, as follows:

Now, *when the land has been so declared to be in Malay Reservation on April 23, 1987, it will lose its character only when it is revoked under the provisions of s. 4(i)(b) of the Enactment* which states:

4(i) The Commissioner may at any time, with the approval of His
H Highness the Sultan in Council by declaration published in the *Gazette*.

(b) revoke any declaration whereby any land has been declared to be a Malay Reservation, either as to the whole or any part of the area therein referred to.

I

It is my judgment that s. 4(i)(b) of the Enactment envisages the situation wherein the revocation needs to be expressed and not implied and that such revocation has to be gazetted so as to be effective (*Mohamed Isa & Ors v. Abdul Karim & Ors* (1970) 2 MLJ 165). *The scheme of the Enactment is to preserve and protect Malay interests and this is clearly reflected in the preamble to the Enactment which states that it is*:

> An Enactment to prevent interests in land from passing out of the hands of the Malay race.
>
> (emphasis added)

[31] To fortify the above discussion, it is also necessary to refer to the case of *Nor Azahar Zainol v. Pentadbir Tanah Langkawi & Ors* [2017] 5 CLJ 629; [2017] 10 MLJ 53. In this case, *Gazette* No. 1180 was published and declared that the whole of Mukim Kuah in the District of Langkawi shall be Malay reservation except the sanitary board area and Township of Kuah, and at that time the land in issue was outside the township of Kuah. Subsequently, *Gazette* No. 26 was published to enlarge the township of Kuah for the purpose of revision of rents and included the land in issue, and the High Court held that *Gazette* No. 26 could not be construed to have the effect of revoking the status of Malay reservation of the land. Furthermore, it was held that only the Ruler in Council could revoke any land declared as Malay reservation under the then s. 4(b) of the Kedah Enactment No. 63 (Malay Reservations), as follows:

> [29] Although the boundaries of the Township of Kuah have been enlarged for the purpose of revision of rents, *Gazette* No 26 could not be construed to have the effect of revoking the declaration of MRL status over the affected land.
>
> [30] This court is of the considered view that Gazette *No 26 could not supersede the express provision of the state law which states that only the Ruler-in-Council could revoke any land which has been declared as a Malay reservation land (see s. 4(b) of the Enactment No 63 as recited above).*
>
> [31] This court is also of the considered view that *the Gazette No 26 could not circumvent the power of the Ruler-in-Council conferred by s. 4 of the Enactment No 63. Only a Gazette made in pursuant to s. 4(b) of the Enactment No 63 could revoke the MRL status of a piece of land*. The *Gazette* No 26 was not made pursuant to s. 4 of the Enactment No 63; it was made pursuant to para 11(d) of the National Land Code.
>
> ...
>
> [34] A declaration under s. 4 of Enactment No 63 was made in the *Gazette* No 1180 whereby the said land was declared to be a MRL. Clearly, the only way to remove a declaration of land as MRL is to formally revoke it under state law. In thepresent case, the declaration of MRL in relation to the said land that was made in the *Gazette* No 1180 has not been revoked.
>
> (emphasis added)

[32] In the plaintiff's submission in reply to the first defendant, the plaintiff argued that the correct procedure to revoke the status of Malay reservation over the land is under art. 89(1) of the Federal Constitution, which is applicable to the Malay Reserved Land declared before Merdeka Day. It was further submitted that since the land was declared as a Malay reservation before Merdeka Day *via Gazette* No. 1180, the revocation of the status should be under art. 89(1) of the Federal Constitution and not under s. 4(1)(b) of the MRE 1930. In submitting the foregoing arguments, the plaintiff seemed to place reliance upon the academic book entitled "*Malaysian Land Law and Procedure*" by Ainul Jaria Maidin and Sharifah Zubaidah Syed Abdul Kader in the following passages:

> [14.026] Article 89(1) of the Federal Constitution emphasizes the sacredness of the Malay reservation institution, as it provides a very stringent procedure in altering the size of the pre-Merdeka Malay reservation land. Any excise, revocation, acquisition or alteration of the existing Malay reservation land areas can only be made by the State Legislative Assembly. *The State has to enact a new Malay Reservation Enactment, which shall be passed by the Legislative Assembly and approved by each House of Parliament*.
>
> [14.027] In the Legislative Assembly, it should be passed by a majority of the total number of members of the Assembly, whether present or not, and the votes of not less than two-thirds of the members present and voting. Subsequent to that, the said Enactment should be approved by a resolution in each House of Parliament. There are two Houses of Parliament, namely the Dewan Rakyat and the Dewan Negara. In the Dewan Rakyat, the Enactment should be passed by a majority of the total registered number of members, irrespective of their attendance, and by the votes of not less than two-thirds of the members present and voting. After that, the Dewan Negara, by a similar proceeding shall approve and pass the Enactment.
>
> *[14.028] The rationale behind this tedious methodology of a long and stringent procedure was to ensure that the State Authority did not misuse the powers granted to them and to also act as a shield in the protection and preservation of the Malay landowners in order to ensure safeguards against haste and arbitrary amendments. Any changes to the size of the Malay reservation land without proper procedures are illegal and, therefore, null and void*. Section 4 of the Federated Malay States Malay Reservation Enactment allows the Menteri Besar, with the approval of the Ruler-in-Council, to alter or revoke partially or wholly the size of Malay reservation land. *However, with an objective or preserving and protecting the Malay race and for creating a uniform system of law and procedure, it is mandatory for the State Authority to comply with Article 89(1) of the Federal Constitution when dealing with Malay reservation land that had been declared prior to Merdeka Day*. If it deals with Malay reservation land that has been declared after Merdeka Day, the State Authority can safely rely on s. 4 of the Federated Malay States Malay Reservation Enactment.

> [14.029] In *Mohamed Isa & Ors v. Abdul Karim & Ors*, Raja Azlan Shah J held that there is only one way a Malay reservation land can be de-reserved that is by way of revocation by the Menteri Besar under s. 4(i)(b) of the Malay Reservation Enactment 1933. This is true in case of Malay reservation land declared after Merdeka Day. *However, in this particular case, it seems that the court had erred in law as the land in dispute was declared as Malay reservation and the declaration was rightly publish in the Gazette, on September 8, 1921 that is, prior to Merdeka Day. Therefore, the law applicable in revocation of the Malay reservation classification for land declared as Malay reservation prior to Merdeka Day must be in accordance with the provision of Article 89(1) of the Federal Constitution and not s. 4(i)(b) of the Malay Reservation Enactment 1933. It is clear that the entire procedure involved in revocation of Malay reservation land under Article 89(1) of the Federal Constitution and the Malay Reservation Enactment differs substantially*.
>
> (emphasis added)

[33] With all due respect, the plaintiff's arguments are misconceived upon a misinterpretation of art. 89(1) of the Federal Constitution. Upon perusal and examination of the entire provision, art. 89(1) of the Federal Constitution seeks to ensure the continuity and effect of Malay reservation declared before Merdeka Day until otherwise provided by an Enactment of the Legislature of that State. This is also further supported by the authoritative reference entitled "*Federal Constitution: A Commentary*" (Sweet & Maxwell, 2019) by Srimurugan Alagan, where it was explained that:

> Under the Federal Constitution, Article 89(1), any Malay reserved land gazetted before Merdeka Day **may continue** as a Malay reservation **unless otherwise provided** by a subsequent enactment which needs to be passed by the State Legislative Assembly and each House of Parliament. ...
>
> (emphasis added)

[34] Accordingly, at this juncture, it shall be decided that in the present case the procedure to revoke the status of Malay reservation over the land *via Gazette* No. 124 was properly done under the then s. 4(b) of the Kedah Enactment No. 63 (Malay Reservations) upon the underlying rationale that the land duly declared and gazetted under the provisions of the State Enactment concerning Malay reservation would only lose its character of Malay reservation when it was duly revoked under the provisions thereof.

[35] In the present case, the then s. 4(b) of the Kedah Enactment No. 63 (Malay Reservations) required an express revocation to be gazetted so as to be effective, and which is also the only way for a Malay reserved land to lose its character, as follows:

> The Ruler-in-Council may at any time either at its own instance or upon the application of any person by declaration in the *Gazette*:
>
> (a) alter the limits or boundaries of any Malay Reservation, or
>
> **(b) revoke any declaration under s. 3, either as to the whole or any part of the area therein referred to**, or

A (c) include in any Malay Reservation any land excluded therefrom.

Such declaration shall take effect on publication thereof in the *Gazette*.
(emphasis added)

Failure Of Swapping

B **[36]** Subsequently, the following issue to be determined is whether the failure of swapping to take place would render the revocation of the Malay reservation over the land void.

[37] Under arts. 89(3) and (4) of the Federal Constitution, it has provided the declaration of any other land of a similar character in a case where any C land ceases to be a Malay reservation and non-authorisation of declaration as Malay reservation of any land owned by non-Malay person respectively:

Malay Reservations 89. ...

(3) Subject to Clause (4), that Government of any State may, in accordance with the existing law, declare as a Malay reservation: D

(a) any land acquired by that Government by agreement for that purpose;

(b) on the application of the proprietor, and with the consent of every person having a right or interest therein, any other land,

E and **shall, in accordance with the existing law, immediately declare as a Malay reservation, in a case where any land ceases to be a Malay reservation, any other land of a similar character** and of an area not exceeding the area of that land.

(4) **Nothing in this Article shall authorize the declaration as a Malay** F **reservation of any land which at the time of the declaration is owned** or occupied by **a person who is not a Malay** or in or over which such a person has then any right or interest.

(emphasis added)

[38] Besides submitting that the swapping did not take place as the G proprietor of Lot 558 was Ng Chin Keong who received the title from Ooi Boon Lai on 17 January 2011, the plaintiff also further argued that Lot 558 was not of a similar character with the land as Lot 558 is under the category of "Pertanian" with the condition of "Bendang" whereas the land is under the category of "Bangunan" with the condition of "Kediaman - Pangsapuri". H As a result, the plaintiff submitted that swapping failed to take place as Lot 558 as the replacement land is not of a similar character with the land, and thus *Gazette* No. 124 is void which renders the land to remain as Malay reservation.

[39] However, a careful reading of art. 89(3) of the Federal Constitution I does not suggest that failure to declare a replacement land of a similar character would render the revocation of the Malay reservation of any land void. Instead, it merely mandates that in the case when the Malay reservation

of any land is revoked, the Government of the State shall in accordance with their Malay Reservation Enactment declare as Malay reservation any land of similar character and of an area not exceeding the area of that land, as explained in "*Land Law in Malaysia: Cases and Commentary*", 3rd edn, (LexisNexis, 2012) by Teo Keang Sood and Khaw Lake Tee, at p. 1035 that:

> [8.258] It may be noted that where any land ceases to be a Malay Reservation, the State Government concerned shall, in accordance with the Malay Reservation Enactment, immediately declare as a Malay Reservation any other land of a similar character and of an area not exceeding the area of that land.

[40] Even though the Federal Constitution is not to be construed in any narrow or pedantic sense, it does not grant any permission to stretch or pervert the language therein, and it would be the case if it was decided that revocation of Malay reservation of any land is void when there is a failure to declare a replacement land of the similar character, by referring to the case of *Merdeka University Bhd v. Government Of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191; [1981] 2 MLJ 356 where Abdoolcader J (as His Lordship then was) held that:

> I said in *Public Prosecutor v. Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 (at page 120), 119, 120 that the Constitution is not to be construed in any narrow or pedantic sense (*James v. Commonwealth of Australia*) [1936] AC 578 (at page 614), but **this does not mean that a court is at liberty to stretch or pervert the language of the Constitution** in the interests of any legal or constitutional theory, or even, I would add, **for the purpose of supplying omissions** or of correcting supposed errors.
>
> (emphasis added)

[41] To fortify, it is also necessary to have regard to *Gazette* No. 127 as in exh. 'MIB-15', which reads as follows:

> In exercise of the power conferred by s. 4(c) of Enactment No. 63 (Malay Reservations) the Rule in Council hereby declares that the land in Mukim Kubang Pasu, District of Kubang Pasu in so far as it relates to the land Schedule hereto and delineated upon Plan No. PW 1431 deposited in the Office of the Director of Survey, Kedah, Kulim to be included as land in Malay Reservation.

[42] Accordingly, a detailed examination of *Gazette* No. 127 allows the necessary conclusion to be drawn that there is nothing to suggest that the declaration as Malay reservation of Lot 558 is intended to replace the revocation of the Malay reservation of the land. Moreover, in the same exh. "MIB-15", there were also *Gazette* No. 128 and *Gazette* No. 129 for the declaration as Malay reservation of lands, which consequently cast doubt as to why it must be Lot 558 as the replacement land. Thus, this further strengthens the proposition that the declaration as Malay reservation of Lot 558 *via Gazette* No. 127 is not intended to serve as the replacement land for the revocation of the Malay reservation of the land, and therefore the

issue regarding the failure of the swapping to take place as the proprietor of Lot 558 was Ng Chin Keong who received the title from Ooi Boon Lai on 17 January 2011 does not affect the validity of the revocation of the Malay reservation of the land.

[43] As a consequence, the originating summons shall be dismissed upon the above grounds alone, and the first issue shall be answered that the land is no longer a Malay reserved and upon the rationale that:

(i) the land duly declared and gazetted under the provisions of the State Enactment concerning Malay reservation would only lose its character of Malay reservation when it was duly revoked under the provisions thereof;

(ii) in the present case, the procedure to revoke the status of Malay reservation over the land *via Gazette* No. 124 was properly done under the then s. 4(b) of the Kedah Enactment No. 63 (Malay Reservations);

(iii) there is nothing to suggest that the declaration as Malay reservation of Lot 558 *via Gazette* No. 127 is intended to replace the revocation of the Malay reservation of the land. Moreover, there were also *Gazette* No. 128 and *Gazette* No. 129 for the declaration as Malay reservation of lands, which consequently cast doubt as to why it must be Lot 558 as the replacement land;

(iv) article 89(3) of the Federal Constitution does not suggest that failure to declare a replacement land of similar character would render the revocation of the Malay reservation of any land void, it merely mandates that in the case when the Malay reservation of any land is revoked, the Government of the State shall in accordance with their Malay Reservation Enactment declare as Malay reservation any land of the similar character and of an area not exceeding the area of that land; and

(v) *Gazette* No. 124 and *Gazette* No. 127 are therefore valid.

Second Issue - Whether The Plaintiff Is Estopped From Filing This Suit

[44] With regard to the second issue, the second defendant had relied upon s. 115 of the Evidence Act 1950 for the argument of estoppel. However, it must be reminded that the present action is by way of originating summons, where evidence is adduced by way of affidavits in accordance with O. 28 r. 3C of the Rules of Court 2012.

[45] Pursuant to s. 2 of the Evidence Act 1950, it has already expressly made clear that it does not apply to affidavits as follows:

Extent

2. This Act shall apply to all judicial proceedings in or before any court, **but not to affidavits** presented to any court or officer nor to proceedings before an arbitrator.

(emphasis added)

[46] The above proposition has also gained support from the case of *Meridian Asset Management Sdn Bhd v. Ong Kheng Hoe & Ors* [2010] 7 CLJ 1; [2018] Supp MLJ 420, where the Federal Court held as follows:

[25] Counsel then argued that the predicament which causes this appeal arises from the development of case law on s. 132 of the Evidence Act 1950, namely, that s. 132, subject to certain conditions, removes a witness's privilege against self-incrimination and compels a witness to answer all questions asked during a trial. **However, s. 2 of the Evidence Act 1950 makes it clear that the provisions therein are not applicable to affidavits**. As such, the said common law privilege would still apparently be available to the defendants herein when being ordered to disclose the whereabouts of the monies siphoned by the first defendant and subsequently disbursed to the second to the fourth defendants.

(emphasis added)

[47] Therefore, based upon the rationale above, the second defendant's argument on estoppel under s. 115 of the Evidence Act 1950 would be untenable as the Evidence Act 1950 does not apply to affidavits in the present case.

[48] Similarly, the first defendant also submitted that the plaintiff was not allowed to blow hot and cold when he pleaded in the CIMB suit that the status of the Malay reservation of the land was revoked and in the present case the plaintiff took the opposite stance that the land is still a Malay reserved land, by relying on the doctrine of approbate and reprobate.

[49] In the case of *Express Newspapers Plc v. News (UK) Ltd And Others* [1990] 1 WLR 1320, the doctrine of approbate and reprobate is explained as follows:

There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principle is one of general application and if, as I think, justice so requires, there is no reason why it should not be applied in the present case.

[50] In the case of *PB Securities Sdn Bhd v. Autoways Holdings Bhd* [2000] 4 CLJ 811; [2000] 4 MLJ 417, the Court of Appeal also referred to *Halsbury's Laws of England* on the principles of approbation and reprobation as follows:

> We refer to *16 Halsbury's Laws of England* (4th Ed) para 1507:
>
> > Approbation and reprobation. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.
>
> In *Amalgamated Investment & Property Co Ltd (In Liquidation) v. Texas Commerce International Bank Ltd* [1981] 3 All ER 577, the court approved the following passage from *Spencer Bower and Turner on Estoppel by Representation* (3rd Ed) 1977 at p 591:
>
> > This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.

[51] In the case of *Lissenden v. CAV Bosch Ltd* [1940] AC 412 (HL), Viscount Maugham explained the origin of approbation and reprobation, and it was found that this doctrine was at the first place confined to cases arising under wills, and deeds and other instruments *inter vivos*, as follows:

> My Lords, I think our first inquiry should be as to the meaning and proper application of the maxim that you may not both approbate and reprobate. The phrase comes to us from the northern side of the Tweed, and there it is of comparatively modern use. It is, however, to be found in Bell's Commentaries, 7th ed., vol. i., pp. 141-2; and he treats "the Scottish doctrine of approbate and reprobate" as "approaching nearly to that of election in English jurisprudence." It is, I think, now settled by decisions in this House that there is no difference at all between the two doctrines. I will cite three cases. First, is the case of *Ker v. Wauchope* where Lord Eldon explained the doctrine in these terms: "*It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. ... The court will not permit him to take that which cannot be his, but by virtue of*

the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person." The next case is that of *Birmingham v. Kirwan* where Lord Redesdale treats the two doctrines as the same. He said: "*The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election*." The third case is that of *Codrington v. Codrington*. Lord Chelmsford observed: "It seemed to be considered in argument that the rule of the Scotch law that a person cannot approbate and reprobate under the same instrument was not altogether the same as the English doctrine of election, but Lord Redesdale in *Birmingham v. Kirwan* puts them exactly on the same footing." Lord Hatherley agreed and said he was himself about to cite the observations made by Lord Redesdale in *Birmingham v. Kirwan* which had just been made by Lord Chelmsford. Lord Cairns L.C. stated the matter thus: "*By the well settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate', and in our courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." In the light of these authorities it seems that the phrase "you may not approbate or reprobate," or the Latin "quod approbo non reprobo," as used in England is no more than a picturesque synonym for the ancient equitable doctrine of election*, originally derived from the civil law, which finds its place in our records as early as the reign of Queen Elizabeth: *Lacy v. Anderson*; and see as regards the history of the doctrine the very learned note of Mr. Swanston to *Dillon v. Parker*.

It is perhaps well to observe here that the equitable doctrine of election has no connection with the common law principle which puts a man to his election (to give a few instances only) whether he will affirm a contract induced by fraud or avoid it, whether he will in certain cases waive a tort and claim as in contract, or whether in a case of wrongful conversion he will waive the tort and recover the proceeds in an action for money had and received. These cases mainly relate to alternative remedies in a court of justice. The history of the common law rules, the principles that apply to them, and the effect of the election are all very different from those which prevail where the equitable principle is in question.

I will not attempt to summarize all the rules which are applicable to election in equity; but it is desirable for my present purpose to state some general propositions which are not I believe in doubt. *In the first place, the doctrine – till the case of Johnson v. Newton Fire Extinguisher Co – seems to have been confined in England as in Scotland to cases arising under wills, and deeds and other instruments inter vivos. In the second place the doctrine is founded on the intention, explicit or presumed, of the testator in the case of a will and of the author or donor in the case of instruments, namely, the intention that a man shall not claim under the will or instrument and also claim adversely to it*. The intention it may be added is not presumed in the case of two clauses in the same will, and in such a case the doctrine does not apply; nor could the doctrine be applied in the case of a married woman where either of the properties between which she would *prima facie* have to elect was subject to a restraint on anticipation; for the imposition of the restraint showed an

A intention that the married woman should not be put to her election: In re Vardon's Trusts. In the third place the doctrine proceeds upon the principle not of forfeiture but of compensation. The beneficiary electing against an instrument is required to do no more than to compensate the disappointed beneficiaries. The balance of the property coming to him under the instrument he may keep for himself. In the fourth place no
B person is taken to have made an election until he has had an opportunity of ascertaining his rights, and is aware of their nature and extent. Election in other words,being an equitable doctrine, is a question of intention based on knowledge.

My Lords, I am quite unable to see how this doctrine can be made to
C apply to the rights of a litigant to appeal either from a judgment or from an award of a county court judge made under the Workmen's Compensation Act, 1925.

(emphasis added)

[52] Most importantly, the Federal Court in the case of *Robert Lee & Anor*
D *v. Wong Ah Yap & Anor* [2007] 4 CLJ 1; [2007] 4 MLJ 393, had clearly decided that rules of equity should not be applied that would defeat the definite objective in the Malay Reservation Enactments as follows:

[52] The opening words of s. 3(1) read: 'Save so far as other provision has been made or may hereafter be made by any written law in force in
E Malaysia ...' What it means is that before applying any English rules of equity (as administered on 7 April 1956 in West Malaysia), we must first ascertain whether there is in existence any written law in Malaysia that it may contravene in a particular case. Even if there is no such law, its application is still subject to the proviso:

F > Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

G [53] The Ordinance and *the Malay Reserve Enactments are laws made with a definite objective. No rules of equity (or common law) should be applied that would defeat such an objective*. What more when the effect is to give effect to a transaction declared to be invalid by the statute.

[54] Unfortunately, quite often, we find that equitable rules have been applied without considering the restrictions imposed by statute (Civil Law
H Act 1956). Not only that, *the application of the rules have, consciously or unconsciously, been extended to situations beyond the original or earlier situations, which even leads to greater injustice*.

(emphasis added)

[53] Premised upon the authorities referred to above, the court is
I constrained to hold that the doctrine of approbate and reprobate being an equitable rule is not applicable to the present context involving Malay reservations, upon the following reasoning:

(i) the Kedah Enactment No. 63 (Malay Reservations) and the MRE 1930 are made with a definite object, which shall not be defeated through the application of equitable rules; and

(ii) the doctrine of approbate and reprobate was in the first place confined to cases arising under wills, deeds and other instruments *inter vivos*, and if it was applied, it would be extended to situations beyond the original or earlier situations, which even leads to greater injustice.

Third Issue – Whether A Limitation Period Has Set In

[54] The third and fourth defendants had in their submissions argued that the present action was time-barred under s. 9(1) of the Limitation Act 1953, which reads as follows:

> Limitation of actions to recover land
>
> 9. (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

[55] The basis of the third and fourth defendants' argument is that the revocation of the Malay reservation of the land was in effective on 13 August 1998 together with the failure of the swapping to take place, which has been more than 12 years as prescribed by s. 9(1) of the Limitation Act 1953.

[56] In the case of *Nasri v. Mesah* [1970] CLJU 85; [1970] 1 LNS 85; [1971] 1 MLJ 32, the Federal Court held that the limitation period begins to run only from the first clear and unequivocal threat to the right to a transfer of the land, as follows:

> For the reasons I have stated, *the period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiff's right to a transfer of the land*. The learned trial judge has stated in his grounds of judgment that if *Ng Moh*'s case [1969] 1 MLJ 46 was binding on him, then he would hold on the pleadings that the first clear and unequivocal threat to the plaintiff's right to possession was the refusal to the first request after the expiration of the moratorium as alleged in the statement of claim. With respect, there is not the slightest indication from the plaintiff's statement of claim that the defendant at any time clearly and unequivocally refused to sign a transfer. Not even in the defendant's statement of defence, which of course the court is not entitled to look at, is there any mention of any refusal. As there is no specific averment in the statement of claim as to when the first of the plaintiff's requests was made, it would be pure conjecture to say that such requests must have been made shortly after the lifting of the moratorium. There can therefore be no basis for the learned judge's finding that such request were refused by necessary implication.

A The fact that the plaintiff chose not to lodge a caveat against the land until 1966 would seem to indicate that until then there was no threat to his right under the agreement. In this connection it is significant that the first clear refusal by the defendant was contained in her letter of 14th October, 1966 to which I have made reference earlier in my judgment. That letter, however, was not in evidence at the trial, although B it hasbeen included in the appeal record. Assuming that we are not entitled to look at it, we have to fall back on the plaintiff's letter of 8th November, 1966 which he sent to the defendant care of another person. As there is no evidence that that letter reached the defendant, the position would therefore appear to be that there never was any refusal by C the defendant to carry out her obligations under the contract. *In the circumstances, it may be argued that this action was premature, but that was not the stand taken by the defendant. In any event, service of the writ on the defendant constituted notice of the appellant's intention to stand on his legal right under the agreement (see Tool Metal Co v. Tungsten Electric Co [1955] 2 All ER 657), and there was no threat to infringe that right until the defence was filed. Whatever view* D *I take of the case, it would seem clear that time did not begin to run against the plaintiff until shortly before the action was filed*. It was therefore not barred by limitation.

(emphasis added)

[57] Subsequently, it was affirmed by the case of *Tan Swee Lan v. Engku* E *Nik Engku Muda & Ors* [1973] CLJU 156; [1973] 1 LNS 156; [1973] 2 MLJ 187, as follows:

On the defence of limitation the question which arose was whether the period of 12 years ran from the date of the agreement, *ie*, April 12, 1958, as contended by the respondents, or, as contended by the appellant, from the date F **when the respondents threatened to infringe his right by saying in their letter of March 16, 1970 that they refused to take any steps to effect the transfer of the land**. Section 9(1) of the Limitation Ordinance, 1953 which governs this question is in these terms:

> 9. (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the G right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

In the Privy Council case of *Bolo v. Kokland & Ors* LR 57 IA 325; AIR 1930 PC 270 it was stated:

> There can be no 'right to sue' until there is an accrual of the right H asserted in the suit and its infringement, or **at least a clear and unequivocal threat to infringe that right**, by the defendant against whom the suit is instituted.

This particular passage has influenced the decision of the Federal Court in *Ng Moh v. Tan Bok Kim & Anor* [1969] 1 MLJ 46 which was later I followed in *Nasri v. Mesah* [1971] 1 MLJ 32. On these authorities the appellant's contention would seem to be correct.

(emphasis added)

[58] In the present case, the second defendant's affidavit in reply, encl. 9 28 April 2022, served as the reply to the plaintiff's notice dated 14 February 2022. On the other hand, the letter of the first defendant's solicitors dated 10 February 2022 replied to the plaintiff's letter dated 10 February 2022 that the first defendant had no actual or constructive knowledge, which does not seem to be a clear and unequivocal threat to infringe the plaintiff's right to the land. However, when it proceeded to state that the plaintiff's letter does not merit the first defendant's reply, it is highly likely suggesting a clear and unequivocal threat to the plaintiff's right to the land as indicating a refusal to take any steps to effect the transfer of the land.

[59] As a result, the plaintiff's action in the present case is not time-barred as the clear and unequivocal threat to the plaintiff's right to the land only happened on 10 February 2022 against the first defendant and 28 April 2022 against the second defendant.

[60] In conclusion, even though the plaintiff's action is not time-barred and the doctrine of approbate, and reprobate is not applicable, the originating summons should be dismissed upon the grounds that the land is no longer a Malay reserved land, taking into account that:

(i) *Gazette* No. 124 and *Gazette* No. 127 are valid;

(ii) the procedure to revoke the status of Malay reservation over the land *via Gazette* No. 124 was properly done under the then s. 4(b) of the Kedah Enactment No. 63 (Malay Reservations);

(iii) article 89(3) of the Federal Constitution does not suggest that failure to declare a replacement land of the similar character would render the revocation of Malay reservation of any land void, it merely mandates that in the case when the Malay reservation of any land is revoked, the Government of the State shall in accordance with their Malay Reservation Enactment declare as Malay reservation any land of the similar character and of an area not exceeding the area of that land; and

(iv) there is nothing to suggest that the declaration as Malay reservation of Lot 558 *via Gazette* No. 127 is intended to replace the revocation of the Malay reservation of the land.

[61] This originating summons is therefore dismissed. The court ordered the plaintiff to pay costs of RM10,000 to the first defendant and RM10,000 to the second defendant. There is no order as to cost for the third defendant and fourth defendant.